

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11 UNITED STATES DISTRICT COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA  
13

14 \_\_\_\_\_  
15 SERGIO CERVANTES-NAVARRO,

16 Petitioner,

17 v.

18 UNITED STATES OF AMERICA

19 \_\_\_\_\_  
20 Respondent.

)  
)  
) Cr. No. 11-2876GT  
) Cv. No. 11-2796GT

) **ORDER**  
)  
)  
)  
)  
)  
)

21 On November 30, 2011, Petitioner, Sergio Cervantes-Navarro ("Mr. Cervantes"), filed a  
22 Motion for Time Reduction, presumably pursuant to 28 U.S.C. § 2255. Mr. Cervantes requests a  
23 two level downward departure based on his status as a deportable alien, which Mr. Cervantes  
24 asserts "should have been considered as a mitigating factor" at his sentencing. The Court has fully  
25 considered this matter, including a review of Mr. Cervantes's brief filed, the authorities cited  
26 therein and the arguments presented. For the reasons stated below, Mr. Cervantes's Motion for  
Time Reduction is **DENIED**.

27 //

28 //

1 First, Mr. Cervantes pled guilty, pursuant to a written plea agreement, to one count of  
 2 Attempted Entry After Deportation, in violation of 8 U.S.C. § 1326(a) and (b). In the written plea  
 3 agreement, Mr. Cervantes explicitly waived his right to appeal and/or collaterally attack his  
 4 conviction or sentence. The Ninth Circuit has long acknowledged that the terms of a plea  
 5 agreement are enforceable. *See, United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996),  
 6 *cert. denied*, 117 S.Ct. 1282 (1997). Since Mr. Cervantes expressly waived his statutory right to  
 7 appeal or collaterally attack his sentence in his plea agreement, Mr. Cervantes is now precluded  
 8 from challenging that sentence pursuant to 28 U.S.C. § 2255. *See, United States v. Abarca*, 985  
 9 F.2d 1012, 1014 (9th Cir. 1993) (holding that a knowing and voluntary waiver of a statutory right  
 10 is enforceable).

11 Moreover, even if Mr. Cervantes had not expressly waived his right to appeal or collaterally  
 12 attack his sentence, his petition would still fail. In essence, Mr. Cervantes argues that because of  
 13 his status as a deportable alien, he is "ineligible[] for pre-release custody and minimum security  
 14 confinement." Mr. Cervantes argues that the Court should grant him a reduction in his sentence  
 15 because of his status. However, Mr. Cervantes's argument that the Court should reduce his  
 16 sentence because he is a deportable alien is precluded by statute and current Ninth Circuit case law.  
 17 By statute, the Court may depart downward only if there are "aggravating or mitigating  
 18 circumstances . . . not adequately taken into consideration by the Sentencing Commission." 18  
 19 U.S.C. § 3553(b). Specifically, the Ninth Circuit has held that the threat of deportation is not a  
 20 factor that the district court may consider for sentencing purposes. *United States v. Alvarez-*  
 21 *Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990).<sup>1</sup> Accordingly,

22 //

23 //

24 //

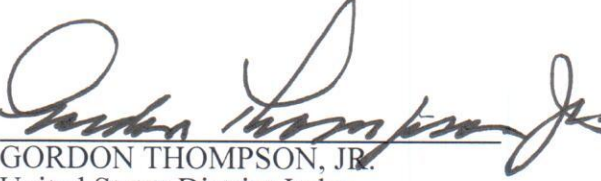
---

25  
 26 <sup>1</sup> The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Limon, was not  
 27 entitled to a six month reduction in his sentence under 18 U.S.C. § 3553(b) because as a  
 28 deportable alien he is not eligible to spend the last six months of his sentence in a half way  
 house pursuant to 18 U.S.C. § 3624(c). *See United States v. Zepeda-Valles*, 87 F.3d 1325 (9th  
 Cir. 1996).

1           **IT IS ORDERED** that Mr. Cervantes's Motion for Time Reduction is **DENIED**.

2           **IT IS SO ORDERED.**

3  
4  
5           12/12/12  
6           date

7             
8           GORDON THOMPSON, JR.  
9           United States District Judge

10           cc: AUSA Bruce Castetter

11           Petitioner